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November 2, 2007

Via Electronic Mail (JDMarshall@waterboards.ca.gov)

James Marshall
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

***Re: Tentative Order R5-2007-_____, NPDES Permit No. CA_____
Waste Discharge Requirements for the Meridian Beartrack Company Royal Mountain King Mine***

Dear Mr. Marshall:

On behalf of the Environmental Law Foundation (“ELF”), a non-profit, public interest organization dedicated to protecting water quality throughout California, I would like to thank you for the opportunity to submit comments on Tentative Order R2-2007-_____, NPDES Permit No. CA_____, authorizing the discharge of waste by the Meridian Beartrack Royal Mountain King Mine (“RMK Mine”) into Littlejohn Creek, a tributary of the French Camp Slough and the San Joaquin River. It is our hope that this discharge will not degrade Littlejohn Creek and the Sacramento/San Joaquin Delta—a requirement under California’s antidegradation policy, which requires that water quality be maintained. (See State Water Resources Control Board Resolution 68-16 (Oct. 24, 1968); 40 C.F.R. § 131.12.) As discussed further below, however, we believe that the Tentative Order does not comply with that policy. Accordingly, we ask the Regional Board to provide more information and revise the Tentative Order so as to ensure that no degradation will occur as a result of this discharge, or to deny the permit for failing to meet water quality standards as required by 40 C.F.R. 122.5.

The RMK Mine permit exacerbates the failure to implement antidegradation measures by also ignoring applicable Total Maximum Daily Load (“TMDL”) limitations in the Sacramento-San Joaquin Delta, in which all relevant waters here reside. As described below, the TMDL’s for methylmercury and dissolved oxygen, both of which require available load allocations for new discharges, are violated by the RMK Mine permit. We therefore ask the Regional board to provide more information on the compliance with all applicable TMDL’s, and for control technologies to be applied to bring the discharge in conformance with applicable water quality standards.

A. California’s Antidegradation Policy

The State Water Resources Control Board first announced a policy to maintain existing water quality in 1968 in Resolution 68-16. In that resolution, the State Board announced its intent that water quality that exceeds water quality standards “shall be maintained to the maximum extent possible.” (State Water Resources Control Board, Resolution 68-16 (Oct. 24, 1968).) Accordingly, the Board ordered that



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Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.

(*Id.*) To implement this policy the State Board mandated that

Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.

(*Id.*)

Since then, the State Board has interpreted Resolution 68-16 to also incorporate the federal antidegradation policy set out at 40 C.F.R. § 131.12 wherever that policy applies.¹ That policy mandates that a state must maintain and protect existing instream water uses and the level of water quality necessary to protect those uses—Tier 1 protection. (40 C.F.R. § 131.12(a)(1).) Furthermore, where water quality exceeds the level necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water, Tier II, the federal policy mandates that that quality be maintained and protected unless (1) the state finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located; (2) the state assures water quality adequate to protect existing uses fully; and (3) the state assures that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control—Tier 2 protection. (*Id.* § 131.12(a)(2).)

The State Board has also interpreted the state’s antidegradation policy to apply on a pollutant-by-pollutant basis. (*In re Environmental Health Coalition*, SWRCB Order No. 91-10, p. 10 (Sept. 26, 1991).) Thus, appropriate findings must be made for each pollutant in a discharge stream, with different findings and evidence for each different “tier” of the receiving water’s water quality. (*Id.*)

¹ See *In re Rimmon C. Fay*, SWRCB WQO 86-17, at p. 20 (“The federal antidegradation policy is part of the Environmental Protection Agency’s water quality standards regulations, and has been incorporated into the state’s water quality protection requirements.”); see also *id.* at p. 23, fn. 11 (“For waters subject to the federal antidegradation policy, both the requirements of the federal antidegradation policy and the express requirements of State Board Resolution No. 68-16 should be satisfied.”).



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B. *The Tentative Order Impermissibly Allows Degradation of Littlejohn Creek, French Slough and the San Joaquin River in Violation of California's Antidegradation Policy*

The Tentative Order authorizes discharges that the Fact Sheet recognizes will increase the volume and mass of pollutants discharged into the receiving water. (Fact Sheet, p. F-40.) Contrary to the Tentative Order's claim that it "does not impact beneficial uses of the receiving waters or downstream receiving waters," *Id.*, these increases will unquestionably impact the fishing, ecological and recreational uses of the receiving waters. The addition of TDS, Arsenic, limited DO, and metals such as mercury are well-documented by the permit and contradict the no-impact conclusion. The Tentative Order Attachment G catalogues the increased mass loading of a number of pollutants under the Tentative Order, including nitrate—a substantial contributor to the low dissolved oxygen (DO) problems that caused a TMDL to be set for DO on the San Joaquin River. But even without loss of beneficial uses, "[t]he requirement that the federal antidegradation policy be applied does not depend upon identification of any discernible impact on beneficial uses." (Chief Counsel to the State Water Resources Control Board, William Attwater, mem. to Regional Board Executive Officers, Oct. 7, 1987 ["Attwater Memo"] at 5.)

Such an increase in mass loadings is impermissible under the state's antidegradation policy, particularly those elements of the policy that implement the federal antidegradation requirements. This is because the San Joaquin River is presently impaired by methylmercury and low dissolved oxygen, and the permit will clearly increase mercury and further reduce DO in the receiving waters. Littlejohn Creek is not a 303(d) impaired water, meaning it must at least meet current water quality standards, and therefore requires Tier 2 antidegradation protection. Under Tier 2, the Board must make findings that economic and social development *will* occur and that this development *requires* the lowering of water quality. (EPA Guidance, *infra*, at 7.) Separately, the ultimate discharge is into the San Joaquin River, a Tier 1 water, and under Tier 1, no further water quality degradation can be allowed unless authorized by a TMDL regardless of the level of control. (40 C.F.R. § 131.12(a)(1); *see* Region 9, U.S. EPA, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 (June 3, 1987), p. 2 ("In cases where water quality is lower than necessary to support these uses, the requirements in Section 303(d) of the Act, 40 CFR 131.10 and other pertinent regulations must be satisfied."); *see also* Attwater Memo at 11 ("[T]he requirement that existing instream uses be protected is not satisfied if existing instream beneficial uses will be impaired, even for a portion of a water body.")) Increased mercury and lowered DO will both impact the fishery and ecological beneficial uses, and are therefore not permitted under the Regional Board's own policy.

The remaining degradation predicted in Attachment G by other pollutants that do not presently impair the San Joaquin River, moreover, can only be permitted subject to more extensive fact-finding by the Board with additional and more detailed analysis than is presently contained in the Tentative Order.² For instance, the Fact Sheet presently justifies the degradation by concluding that the Tentative Order "is consistent with Resolution 68-16 because (1) such degradation is consistent with the maximum benefit to the people of the state, (2) the discharge is the result of wastewater utility service that is necessary to accommodate housing and economic

² Some elements of the Order, however, will remain contrary to the state's antidegradation policy even with more extensive findings. For instance, the Tentative Order fails to provide for public review and comment of the discharger's pollution reduction plan for salinity, which is to be developed after the Order's issuance. This is contrary to the requirement under the state's antidegradation policy that any degradation be subject to public review. (40 C.F.R. § 131.12(a)(2).)



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expansion, and (3) it results in a high level of treatment of sewage waste.” (Tentative Order, p. F-8.)

Such findings, however, are inadequate. Absent from the discussion are the findings required under 40 C.F.R. § 131.12 such as the finding that the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control have been “achieved.” (40 C.F.R. § 131.12(a)(2).) This finding is necessary given that the federal policy applies to Littlejohn Creek. After all, the creek is a water of the United States and subject to Tier 2 protection with regard to all the non-impairing pollutants in the discharge. (*See* Attwater Memo, p. 3 (“the State and Regional Boards must apply the federal antidegradation policy to all ‘waters of the United States’ within the State of California”).)

Absent as well are other findings that are required under the federal antidegradation policy “whether or not water quality is significantly lowered.” (EPA Guidance, p. 7.) For instance, under Tier 2, the Board must make findings that economic and social development *will* occur and that this development *requires* the lowering of water quality. (*Id.*) That means that before the Board can authorize the discharge, the Board must first determine that the degradation cannot be mitigated through reasonable means and that there are no feasible additional or alternative control measures that would lessen or preclude the predicted degradation permitted by the Tentative Order. The Tentative Order, however, fails to make any such determination.

Feasibility under the state’s antidegradation policy does not translate into “cheapest.” (*See* Water Code § 13000 (“the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation”).) After all, it is always going to be cheapest to dump wastes into the state’s waters. The point behind the Porter-Cologne Act and the state’s antidegradation policy, though, is that “[i]t costs much less in the long run—and the result is much more certain—to spend the money needed for an effective water quality control program than to try to salvage water resources that have been allowed to become unreasonably degraded.” (Final Report of the Study Panel to the California State Water Resources Control Board (Mar. 1969), p. 1.) An unwillingness to raise rates, therefore, simply does not equate to infeasibility. Thus, what alternatives exist to the degrading discharges and why hasn’t the Board required such alternatives?

Second, the findings have no basis in the record. As stated in APU 90-004, “[t]o accurately assess the impact of the proposed project, the projected baseline socioeconomic profile of the affected community without the project should be compared to the projected profile with the project.” (APU 90-004 (Guidance for the Regional Board), at 5.) This, the Tentative Order does not do. Instead, the Tentative Order’s “Justification for Socioeconomic Considerations” strictly relies on conclusory statements without any support in the record—the hallmark of arbitrary and capricious decision making.³ It makes purely subjective value

³ *Healing v. California Coastal Comm.* (1994), 22 Cal. App. 4th 1158, 1167 (“A conclusory statement in findings, unsupported by any evidence in the record . . . is per se insufficient.”); *Southern California Edison Co. v. State Water Resources Control Bd.* (1981), 116 Cal. App. 3d 751, 759; *see also Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974), 11 Cal. 3d 506, 516; *Glendale Memorial Hosp. & Health Center v. Dept. of Mental Health* (2001), 91 Cal. App. 4th 129, 140-42 (holding unspecified, “boilerplate” findings insufficient where greater detail was necessary to determine whether there was support for the agency determination); *City of Rancho Palos Verdes v. City Council of Rolling Hills Estates* (1976), 59 Cal. App. 3d 869,



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judgments on long-term benefits associated with short-term pollution. (Order at F-42). Absent from the Socioeconomic Considerations are the impact on fisheries and wildlife, which create fishing, scientific and recreational uses for the waters of the San Joaquin River. All of these activities include a socioeconomic dimension which will suffer with the issuance of this Order. Likewise, the “no observable effects” standard is arbitrary because it is unclear whether it would limit the assessment of impacts to visual accountability, when it is clear by its own terms that the permit will increase DO and impair beneficial uses. Without these considerations, the requirements of the antidegradation laws are not met.

The Tentative Order acknowledges that water quality will be degraded for DO and Arsenic. First the Order notes that DO for the plant was as low as .88mg/L, making the instantaneous DO minimum of 5 mg/L appear to be improbable without additional aeration. Tentative Order at F-28. Even taking into account the average DO concentration of 5.7 mg/L, the Board concludes that “the effluent exceeded the Basin Plan DO objective,” as provided in part by the DO TMDL described below.

Lastly, the antidegradation analysis is insufficient because it fails to take into account “the cumulative impacts of all previous and proposed actions and reasonably foreseeable actions which would lower water quality below the established baseline.” (EPA Guidance, p. 6.) In this connection, the Board must consider other discharges to Littlejohn Creek, French Slough and the San Joaquin River. Any analysis without a consideration of cumulative impacts will simply be worthless.

All told, then, the Tentative Order and Fact Sheet fail to demonstrate proper compliance with the state’s antidegradation policy. The Fact Sheet also demonstrates that the Regional Board has failed to fully analyze with any substantial depth and support the rationale justifying the proposed discharge. The state’s antidegradation policy, therefore, precludes the Regional Board from issuing the Tentative Order until these issues are addressed.

C. The Permit Must Conform With Applicable TMDL's For the San Joaquin River

ELF submit the following comments regarding the RMK Mine's permit as it relates to TMDL's for the San Joaquin River, into which Littlejohn Creek and French Camp Slough discharge.

1. The permit fails to adequately control mercury. As a new permit applicant with a reasonable potential to add to TMDL pollutant loads, the permit must identify a pollutant load allocation available for methylmercury under the San Joaquin River methylmercury TMDL. The permit makes no mention of whether such an allocation is available. In addition, the TDS discharge identified in the permit will cause additional mercury methylation in the San Joaquin River. The permit measures mercury discharge solely in terms of total mercury discharged, but should be measured in methylmercury, or at least explain how the total mercury discharged will
2. The permit fails to adequately control dissolved oxygen (DO). The permit must identify a pollutant load allocation available for for DO in the



D. The Tentative Order's Mercury Limit Is Disallowed Under San Joaquin Methylmercury TMDL.

The RMK Mine NPDES permit at issue here allows for a mercury discharge of 1 microgram, or part per billion, of mercury into Littlejohn Creek. (RMK Mine Permit at 11). In contrast, the total maximum daily load (TMDL) set for the San Joaquin basin is .06 nanograms, or parts per trillion. In other words, the mercury discharge limit for the RMK Mine is an entire magnitude greater than what is permitted in the San Joaquin TMDL. The permit makes no justification for allowing such an alarming discharge for this highly toxic heavy metal.

Littlejohn Creek is a water of the United States and a tributary to the San Joaquin river. (Permit at 4) An evaluation of pollutants feeding into the San Joaquin river finds that tributaries are the single largest contributor mercury loads, at 60% of the total. Sacramento-San Joaquin Delta Estuary TMDL for Methylmercury Staff Report, (Draft Report for Scientific Review, June 2006), at 65. Yet the RMK Mine permit at issue impermissibly adds to that load without seeking an allocation. Because tributaries such as Littlejohn Creek have been identified as prime suppliers of impairing pollutants, and mines such as the RMK have been designated as the prime source, it is the responsibility of applicants for WDR's such as those at issue here to apportion the available pollutant load allocation for each specific TMDL. Given the severe impairment of the San Joaquin for both methylmercury and dissolved oxygen, such ignorance of the TMDL is alarming.

The San Joaquin Is Severely Impaired By Mercury Pollution

The San Joaquin River is a § 303(d) impaired water under the state's implementation of the Clean Water Act. Pursuant to federal law, the Central Valley Regional Water Quality Control Board created Total Maximum Daily Loads ("TMDL"s) for pollutants found to be at levels currently exceeding water quality standards for that water body. In the San Joaquin River, TMDL's have been created for Total Dissolved Oxygen, Selenium, and Mercury, among others.

The San Joaquin Delta Estuary underwent a TMDL analysis for methylmercury because the CVRWQCB determined the water was severely mercury impaired as early as 1990. Draft Staff Report at 1. This impairment created elevated levels of mercury in fish, that posed a health risk to both humans and animals. *Id.* A draft basin amendment was subsequently approved by the CVRWQB, and is awaiting final approval by EPA.

Under this TMDL, dischargers into the San Joaquin river are being required to reduce their discharge of methylmercury by up to 75%, and in no case is even the *existing* discharge anywhere as high as that for the RMK Mine.⁴

The Methylmercury TMDL Does Not Have An Adequate Unassigned Allocation for RMK Mine

⁴ The methylmercury TMDL provides current limits on dischargers of municipal and industrial wastewater into the San Joaquin river, which range from .02 to .94 nanograms of methylmercury per liter (ng/l). Those dischargers with methylmercury levels above .06 ng/l were required to reduce their discharge by between 59-75%. In contrast, the RMK Mine's limit for mercury is up to two micrograms daily.



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By the terms of a TMDL, a new discharger must seek and acquire a pollutant load allocation, assuming such an allocation is available. For the Methylmercury TMDL, no such allocation appears to be available for French Slough, which already requires a 65% reduction in existing methylmercury levels. Methylmercury Draft Basin Plan Amendment at BPA-31.

The Tentative Order itself recognizes this problem, conceding that “the receiving water regularly exceeds the Basin Plan objective and no assimilative capacity for DO is available.” Tentative Order at F-28. Despite this finding, the Order does not require the discharger to exceed the TMDL standard for DO and actually improve water quality, but instead merely acknowledges the discharge's deleterious effects without implementing a solution. Acknowledgment, while admirable, is insufficient under the TMDL.

TMDL's Must Be Considered Whenever A Discharger Will Have An Impact on an Impaired Water.

By regulation, TMDL load allocations are required for new WDR permits that allow discharge into impaired waters such as the San Joaquin. The Ninth Circuit recently held that the federal regulation at 40 CFR § 122.4(i) forbids issuance of a NPDES permit that violates existing water quality standards by not considering TMDL's in the permit. Friends of Pinto Creek v. EPA (9th Cir. 2007) 2007 WL 2874335 (not yet cited in federal reporter). The Court wrote that EPA, in issuing a TMDL permit, was required to reference the load allocation specified in the TMDL, “to show how the water quality standard will be met if [the discharger] is allowed to discharge pollutants into the impaired waters.” *Id.* at 7. California administers the NPDES Clean Water Act permitting by EPA, which makes it the State's responsibility to enforce the TMDL permitting requirements at issue in Friends of Pinto Creek. See 40 CFR § 122.5 (requiring state-delegated programs to follow the same requirements as 40 CFR § 122.4.) Therefore, WDR's such as those for the RMK Mine must comply with applicable water quality standards, and such standards include both antidegradation measures and consideration of all applicable TMDL's.

Although Littlejohn is not itself listed as a water quality-impaired water body, it feeds into French Slough and the San Joaquin river, which both have impaired water quality. That there is no TMDL allocation for Littlejohn Creek does not excuse the Regional Board or the discharger from considering the impacts of the Creek, and the discharger, on French Slough and San Joaquin River. French Slough, which Littlejohn Creek directly feeds into, is listed as a component of the San Joaquin River in the methylmercury TMDL. Methylmercury Draft Basin Plan Amendment at BPA-21. French Slough already has a current load of .14 ng/l methylmercury and requires a 65% reduction to meet its load allocation in the TMDL. *Id.* at BPA-31. If the RMK Mine was actually permitted to discharge into Littlejohn Creek when the TMDL was written, then Littlejohn Creek would have been included among the tributaries. That Littlejohn Creek was not included on the list because the CVRWQCB had not yet identified the RMK Mine as a discharger, and thus Littlejohn Creek as a contributing tributary, provides no defense for denying protection to the creek; under this logic, any new discharger could find an unidentified tributary and discharge with utter ignorance of the loading of the waters contrary to the TMDL.

Separately, the discharger may claim that the methylmercury TMDL does not need to be considered because it is not yet final. This is not a valid reason to not consider the TMDL that is



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all but finalized. First, the Methylmercury TMDL is well past the approval stage for the Regional Board's final staff report and basin plan amendment; in other words, the methylmercury TMDL is currently in the final form intended by the Board. Therefore any prospective discharger should reasonably anticipate the implementation of the TMDL.

The Mercury Limit in the Permit Must Be Evaluated In Terms of Methylmercury Production

The RMK Mine permit lists mercury discharge in terms of total mercury, while the TMDL primarily limits methylmercury. This is because elemental mercury only becomes harmful when methylized. Many factors cause mercury to be converted into methylmercury, and ELF realizes it is no simple task to assess a mercury discharge in terms of its eventual conversion. Yet the lack of certainty here does not in any way relieve the discharger of its responsibility to account for methylmercury. Indeed it is the responsibility of the regional water board and/or the discharger to identify this discrepancy and evaluate its discharge in terms of eventual methylmercury production. The fact that heavy metals have been allowed to sit in Skyrocket Pit provide excellent conditions for methylmercury production. However complicated the connection between these two substances may seem, there is one simple conclusion: less mercury discharged will create less methylmercury.

The TDS (Salt) Discharge Allowed By the Permit Will Impermissibly Increase Methylmercury In the San Joaquin Delta.

When combined with electrical conductivity, noted below, the RMK mine may dramatically increase the facilitation of methylmercury production in the San Joaquin River. ELF is also concerned with the impact of TDS' on methylmercury in the San Joaquin Delta. The Methylmercury TMDL Draft Basin Plan Amendment states that "changes in the salinity concentrations of Delta waters (with the resulting changes in sulfate concentrations) may also influence the ambient methylmercury levels in the Delta." Amendment at BPA-7; Draft Staff Report at 2. The permit's TDS amendments to the Delta will increase methylmercury production.

The Permit Fails to Establish Electrical Conductivity (EC) Effluent Limits, When EC Impacts Methylmercury Production In the San Joaquin Basin.

According to the Draft Staff Report for Scientific Peer Review on the Methylmercury TMDL for the Delta, the sulfates that can stimulate methylmercury production are in turn created by increases in electrical conductivity. Because the increase in EC may ultimately impact the production of methylmercury in the San Joaquin Basin, it is necessary to set an effluent limitation on EC, as well as sulfates, in any new upstream permits, such as the RMK Mine permit at issue here.

II. The Dissolved Oxygen (DO) Limit in the Permit Does Not Meet the Minimum DO For the San Joaquin TMDL

The San Joaquin Delta Dissolved Oxygen (DO) TMDL requires a minimum level of 5 mg/l for certain times of the year, and 6 mg/l between September 1 and November 30 of each year. Yet the permit allows a minimum of 5 mg/l without accommodating for the seasonal fluctuation in the TMDL.



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As with the methylmercury TMDL for the San Joaquin, the DO TMDL requires that new dischargers find an available load allocation. The Basin Plan Amendment reads

Wasteload allocations and permit conditions for new or expanded point source discharges in the SJR Basin upstream of the DWSC, including NPDES and stormwater, will be based on the discharger demonstrating that the discharge will have no reasonable potential to cause or contribute to a negative impact on the dissolved oxygen impairment in the DWSC.⁵

This requirement clearly states that a new permit holder such as the RMK mine must demonstrate that it will not further impair the DO levels. Yet the RMK Mine NPDES permit allows for a discharge significantly less than the 6 mg/l minimum DO required between September 1 and November 30. During these month's the RMK Mine's constant permitted DO discharge of 5 mg/l will add to the impairment of the water channel, something clearly prohibited by the Regional Board itself in the Basin Plan Amendment.

Thank you for your time in considering these comments. If you have any questions, please do not hesitate to contact me. I look forward to working with you and the Regional Board to address these concerns.

Sincerely,

Adam Lazar
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⁵ Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control Program for Factors Contributing to the Dissolved Oxygen Impairment In the Stockton Deep Water Ship Channel. (Final Staff Report, Central Valley Regional Water Quality Control Board, February 28, 2005), at 10 .